

PUBLIC UTILITIES COMMISSION505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

February 24, 2003

Agenda ID# 1816

Ratesetting

8a 2/27/03

TO: PARTIES OF RECORD IN R.01-10-024

Enclosed is the proposed alternate decision of Commissioner Peevey. It will be on the Commission's agenda on February 27, 2003, along with the proposed decision of Administrative Law Judge (ALJ) Halligan. The Commission may act then, or it may postpone action until later.

When the Commission acts on the proposed decisions, it may adopt all or part of them as written, amend or modify them, or set them aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

The alternate decision of Commissioner Peevey is being mailed for comment under the provisions of Rule 77.7(f)(9) of the Commission's Rules of Practice and Procedure, which allows the Commission to reduce, but not eliminate, public comment in situations required by "public necessity." For these purposes, "public necessity" refers to circumstances in which the public interest in the Commission adopting a decision before expiration of the 30-day review and comment period clearly outweighs the public interest in having the full 30-day period for review and comment. It is in the public interest to consider the DWR Biomass contracts before those contracts expire. Therefore, in this situation, public necessity requires that the Commission reduce the public comment period. Parties should serve comments electronically by Wednesday, February 26, at 10:00 a.m and should send them by email to the ALJ (jmh@cpuc.ca.gov), and to Commissioner Peevey's advisor Julie Fitch (jf2@cpuc.ca.gov). Parties must file hard copies of comments with the Commission's Docket Office by 5:00pm on February 26. No reply comments will be accepted.

/s/ ANGELA K. MINKINAngela K. Minkin, Chief
Administrative Law Judge

jf2:acb

Attachment

Decision **ALTERNATE DRAFT DECISION OF COMMISSIONER PEEVEY**

(Mailed 2/24/03)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Establish
Policies and Cost Recovery Mechanism For
Generation Procurement and Renewable
Resource Development.

Rulemaking 01-10-024
(Filed October 25, 2001)

**INTERIM OPINION
ADDRESSING PETITION FOR MODIFICATION OF DECISION 02-09-053 BY
THE DEPARTMENT OF WATER RESOURCES**

Summary

In Decision (D.) 02-09-053, the Commission allocated the California Department of Water Resources' (DWR's) long-term power purchase contracts between Pacific Gas and Electric Company (PG&E), San Diego Gas and Electric Company (SDG&E), and Southern California Edison Company (SCE), collectively referred to as the "utilities." As explained in that decision, the allocation of DWR contracts was a necessary step towards achieving the Commission's and the Legislature's goal of returning the utilities to the procurement function by January 1, 2003.

On January 7, 2003, DWR submitted a memorandum requesting that the Commission consider modifying D.02-09-053 for the purpose of allocating four additional power purchase agreements between DWR and Madera Power, LLC, Dinuba Energy, Sierra Pacific Industries (Sonora), and Sierra Power Corp. (Terra Bella) to one or more of the utilities.

We have reviewed DWR's request and the parties' comments and grant DWR's request to modify D.02-09-053. As discussed below, adopting DWR's request to allocate four additional contracts to one or more utilities is consistent with D.02-08-071 and D.02-12-074 as well as State renewable energy policy, as articulated in SB1078 (Sher), which adopts a renewable portfolio standard (RPS) for the utilities.

DWR's Request

According to DWR's January 7, 2003, memorandum, DWR entered into contracts with Madera, Dinuba, Sonora, and Terra Bella for the purchase of unit contingent energy on December 7, 2001. The first three contracts deliver power North of Path 15, while the fourth delivers power South of Path 15. The agreements were extended on March 29, 2002 and June 26, 2002. On December

31, 2002, DWR extended the agreements until June 20, 2003 “to enable the facilities to seek long-term agreements with an IOU subject to CPUC approval.”¹ The agreements provide for automatic termination if the Commission does not allocate the agreements to one of the utilities before February 27, 2003.²

DWR identifies the potential benefits of allocating the four biomass agreements as follows: 1) The extension of these four agreements provides 48 megawatts of additional capacity and energy; 2) the allocation would provide support for renewables through the continued generation of 48 megawatts from renewable sources; 3) the biomass facilities are important to the local economies in which each is situated; and 4) the allocation provides a net positive cash flow for DWR because the contract price is less than the remittance rate.

DWR also identified the following potential concerns associated with allocating these agreements to one or more utilities: 1) The facilities were offered to the utilities during the recent interim procurement process, but were not selected; 2) The utilities will be in a long position during some hours over the next four to five months and will need to sell surplus energy; 3) The costs associated with these contracts are not included in DWR’s 2003 Revenue Requirement.

Positions of the Parties

Comments on DWR’s request were filed on January 27, 2003 by SCE, SDG&E and the California Biomass Energy Alliance (CBEA). DWR filed reply

¹ DWR Memorandum Section I. Page 1.

² DWR submitted a Memorandum on January 31, 2003, informing the Commission that DWR and the relevant contracting parties had amended the power purchase agreements extending the expiration date from January 31, 2003 to February 27, 2003.

comments on January 31, 2003. The utilities oppose adopting DWR's request to allocate the four additional biomass contracts. CBEA supports DWR's request.

SCE objects to the proposed allocation. SCE argues that DWR's petition does not explain why it is appropriate for the utilities to assume the obligations of these contracts. SCE points out that the utilities have already considered proposals from these same facilities as part of the interim procurement solicitation for renewable resources and that these proposals were not found to be competitive relative to other proposals. SCE believes that requiring the utilities to accept an allocation of these contracts would unfairly provide these parties with a "second bite at the apple."

Furthermore, SCE argues that one of the purported benefits of the allocation cited by DWR, the "support for renewables," is misleading because allocation of the Sierra Power contract would actually undermine the Commission's renewable procurement initiatives by allowing certain parties to bypass the utilities' approved solicitation processes, despite the fact that the contract price of the facilities in question is significantly higher than the Commission's "all-in" benchmark price for renewable procurement. SCE also questions why the utilities should be required to pay 60% more than DWR's contract rate for the same energy.

SCE argues that the contracts cannot be lawfully allocated to the utilities because they expire on January 31, 2003 and that the Commission cannot act before that date because none of the circumstances which justify a waiver or reduction of the 30-day public review and comment period are applicable to the current situation.

SDG&E expresses concern regarding ongoing and piecemeal proposals to modify the allocations that were adopted in D.02-09-053. SDG&E assumes that the Commission will allocate these contracts to the utilities, but states that it does

not require additional supply and any additional contract allocations would exacerbate an existing excess supply situation. SDG&E also claims that DWR's analysis of the benefits of allocating the contracts to the utilities is flawed. For example, although SDG&E is sympathetic to the economic impacts of the biomass facilities on the local economies in which each facility is located, SDG&E does not believe that ratepayer funds should be used to subsidize and sustain energy business interests that might otherwise fail. SDG&E notes that DWR's assertion that "the contract price is less than the Commission's remittance rate for energy delivered to retail end-use customers" is confusing and ignores the key fact that these contracts exceed by considerable measure the market price benchmark that was established by the Commission for interim renewables procurement. SDG&E points out that none of the facilities responded to SDG&E's Request for Offers, but that SDG&E would not have procured the power at \$65/MWh. SDG&E suggests that the Commission consider the effect of providing special treatment for these four renewable suppliers who were unsuccessful in securing a contract with the utility through the Commission's adopted approach.

SDG&E suggests that, if the Commission intends to allocate these contracts to the utilities, it should only do so under four conditions: 1) the price should not exceed \$53/MWh and any amount in excess of \$53 should be provided by the California Energy Commission (CEC); 2) the energy should contribute to the utility's one percent renewables requirement; 3) the energy should be banked for future Renewable Portfolio Standard compliance; and 4) if transmission is constrained and the utility must resell the energy, the utility should still receive credit for the contribution of energy toward its RPS requirement.

CBEA argues that the failure of these facilities to receive contracts from the utilities is the result of noncompliance by the utilities with the one percent

renewables requirement adopted in D.02-08-071. For example, CBEA argues that much of PG&E's renewable procurement will not be certified as incremental by the CEC and that the Commission will need to order PG&E to conduct another renewables solicitation to make up the difference. With respect to SCE, CBEA notes that the Commission has held that SCE is not in compliance with the interim renewables requirement, and that SCE's two advice letters on renewables procurement have been protested and their approval is in doubt. CBEA also argues that PG&E and SCE have failed to provide the appropriate data on its renewables procurement requirement.

CBEA argues that, as a result of the utilities' noncompliance, a number of existing renewables facilities, including the four biomass facilities that are the subject of DWR's petition, were left without contracts. CBEA claims that if the Commission does not grant this petition, the contracts will be automatically terminated, and in some cases, the facilities would be forced to close permanently. CBEA notes that D.02-12-074 recommended that biomass facilities without contracts explore a number of options to keep running, including a "potential short-term contract extension through DWR." CBEA claims that the allocation of these contracts to the utilities is necessary to ensure their survival until the utilities can be brought into compliance with the one percent renewables requirement.

Discussion

The Commission's Rules of Practice and Procedures provide all interested parties (and participating state agencies, such as DWR) the opportunity to petition the Commission to make changes to an issued decision.³ In this case

³ Rules of Practice and Procedure, Rule 47.

DWR has requested that the Commission consider modifying D.02-09-053 to allocate an additional four contracts to one or more utilities. For the Commission's consideration, DWR presented a brief listing of several potential benefits associated with its request, as well as several potential concerns. We have carefully reviewed DWR's request and the parties' positions and find that the benefits cited by DWR are reasonable. We also believe that there are significant benefits beyond those given by any party in their comments. We discuss these issues below.

The primary benefits cited by DWR are the fact that these contracts would provide an additional 48 megawatts of capacity and energy to California's renewable supply portfolio. Although those 48 megawatts may provide excess power during some periods, we note that DWR was subjected to a great deal of criticism for the small amount of renewable power they brought under contract during 2001. These contracts were signed at the time of the crisis, and as such, should not be treated any differently from any of the other contracts that DWR signed during this period. All other contracts were allocated in D.02-09-053. In addition, at a time when increasing renewable electricity procurement is state policy, we are reluctant to abandon existing renewable resources.

As the utilities point out in their comments, one of the Commission's approved methods of supporting and procuring renewable resources was through the one percent set-aside requirement and interim competitive solicitation process adopted in D.02-08-071. They argue that granting contracts to these four facilities outside of the adopted process would be inconsistent with prior Commission decisions and would undermine the Commission's goals by encouraging other unsuccessful bidders to seek similar relief, if not through DWR contract extensions (since DWR's authority to contract has expired), then through requests to the Commission.

It is not our intent in this decision to give preference to some bidders over others in the interim renewable solicitation process. In fact, the contracts at issue in this decision were already held by DWR prior to the Commission's interim renewable solicitation process. Thus, DWR was free to extend those contracts and request that the Commission allocate them, and they have done so. Therefore, the action we take today is wholly unrelated to the process adopted in D.02-08-071. We make no judgement about whether the contracts at issue in this decision should have been granted contracts through the interim solicitation process.

We note, however, that we are required in the future, under the terms of SB1078 establishing an RPS process, to develop mechanisms to increase the amount of renewable power under contract to utilities in the state. While we do not wish to increase renewable resources at all costs, we believe that DWR exercised its discretion in signing these contracts originally under terms that they deemed just and reasonable. Thus, it is prudent to take steps to preserve the amount of existing renewable resources under contract. As of the date of this decision, we are only beginning to develop mechanisms under the RPS process, and therefore cannot be assured that the existing resources will be competitive under those rules. They should, however, be granted a fair opportunity to participate, which the allocation of these contracts will allow.

We also believe that these biomass contracts bring significant economic benefits to the local communities in which they operate, as pointed out by CBEA in their comments. In addition, should these biomass facilities not be under contract to generate power, the waste products which fuel them are still likely to be burned, creating significant *negative* environmental effects in the State. In evaluating renewable energy bids, we so far do not have a mechanism to capture these environmental costs to be offset against the generally higher prices for

power charged under these contracts. Until such time as we develop these appropriate mechanisms under the RPS process, we find it prudent to allocate these existing DWR contracts.

We also note that D.02-12-074 did, in fact, invite biomass facilities to negotiate contract extensions with DWR. Thus, we encouraged exactly the kinds of contracts DWR proposes to allocate in this proceeding.

For all of the reasons stated above, we will allocate the contracts to the utilities as DWR has requested. Since the Madera, Dinuba, and Sonora contracts have delivery points North of Path 15, those contracts should be allocated to PG&E. Because the Terra Bella contract delivers power South of Path 15, it should be allocated to SCE.

Finally, as SDG&E suggests, we find it reasonable to make these contracts eligible for inclusion in the utilities' RPS requirements in the future, since they serve to augment the amount of renewable energy under contract to PG&E and SCE.

Assignment of Proceeding

Loretta Lynch is the assigned Commissioner and Julie Halligan is the assigned Administrative Law Judge in this proceeding.

Comments on the Alternate Decision

The alternate decision of Commissioner Peevey is being mailed for comment under the provisions of Rule 77.7(f)(9) of the Commission's Rules of Practice and Procedure, which allows the Commission to reduce, but not eliminate, public comment in situations required by "public necessity." For these purposes, "public necessity" refers to circumstances in which the public interest in the Commission adopting a decision before expiration of the 30-day review and comment period clearly outweighs the public interest in having the full 30-

day period for review and comment. If the Commission does not act on February 27, 2003, the DWR biomass contracts will expire, which is not in the public interest. Therefore, in this situation, public necessity requires that the Commission reduce the public comment period. Parties wishing to file comments should do so by Wednesday, February 26, at 10:00 a.m. No reply comments will be accepted.

Findings of Fact

1. On January 7, 2003, DWR submitted a Memorandum requesting that the Commission consider modifying D.02-09-053 for the purpose of allocating four additional power purchase contracts to one or more investor-owned utilities.
2. DWR's proposed allocation of four additional biomass contracts would keep 48 MW of existing renewable resources providing power to California.
3. DWR's proposed allocation is consistent with Legislative renewable portfolio standard (RPS) procurement policies and the Commission's findings in D.02-08-071 and D.02-12-074.
4. The four biomass contracts provide environmental benefits to the communities in which they operate.
5. Failure to keep the four biomass facilities under contract could result in negative environmental consequences to the communities in which they are located.

Conclusions of Law

1. DWR's proposed allocation is reasonable in light of Legislative and Commission renewables policy and should be granted.
2. Contracts with delivery points North of Path 15 should be allocated to PG&E and South of Path 15 should be allocated to SCE.

3. The comment period on this decision should be reduced in accordance with Rule 77.7(f)(9) of the Commission's Rules of Practice and Procedure, which allows the Commission to reduce the normal 30-day public review and comment period due to "public necessity." "Public necessity" refers to circumstances in which the public interest in the Commission adopting a decision before expiration of the 30-day review and comment period clearly outweighs the public interest in having the full 30-day period for review and comment. The expiration of the biomass contracts on February 27, 2003, clearly meets this definition of public necessity.

O R D E R

IT IS ORDERED that:

1. The request to modify Decision 02-09-053 submitted by the Department of Water Resources on January 17, 2003 is granted.
2. The Madera, Dinuba, and Sonora contracts shall be allocated to PG&E.
3. The Terra Bella contract shall be allocated to SCE.
4. The renewable power under the Madera, Dinuba, Sonora, and Terra Bella contracts shall be eligible for inclusion in the utilities' renewable portfolio standard requirements for new renewable resources going forward.
5. In accordance with Rule 77.7(f)(9), which allows the Commission to reduce, but not eliminate, public comment in instances where the Commission determines that public necessity requires it, the comment period on this decision shall be reduced to two days.

This order is effective today.

Dated _____, at San Francisco, California.

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Commissioner Peevey's Alternate Draft Decision, on all parties of record in this proceeding or their attorneys of record.

Dated February 24, 2003, at San Francisco, California.

/s/ Sally Cuaresma
Sally Cuaresma

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074, TTY **1-866-836-7825 or (415) 703-5282 at least** three working days in advance of the event.